The question remains: Should *Rodrigue* be applied retroactively? From purely equitable considerations, we would have to agree with applicants that it probably should not. We recognize, however, that there are precedents for either position, equities notwithstanding. This seems apparent from the recent decision rendered by this Court in *United States v. Estate of Donnelly*, 1970, 397 U.S. 286, 90 S.Ct. 1033. The question before the Court was whether it should apply retroactively its own prior decision which changed the law respecting the mode of filing federal tax liens. Retroactivity would have burdened with a tax lien property acquired by innocent purchasers at a time when the established law permitted them to acquire it without a tax lien. The equities against retroactivity were just as strong as in *Chicot County Drainage District v. Baxter State Bank*, 1940, 308 U.S. 371, 60 S.Ct. 317, 87 L.Ed. 329. However, only three dissenters chose to follow *Chicot*, while the majority voted in favor of retroactivity. See also: Anno.: Prospective or Retrospective Operation of Overruling Decisions, 10 ALR3d 1371; and *United States v. Kelly*, 314 F. Supp. 505, (E.D. N.Y. 1970) which catalogs innumerable cases dealing with the problem and neatly separates them into two groups—pro and con—each group being of apparently equal length and weight.

Beside agreeing with applicants that a writ should issue in this case, we must also, on further reflection, agree with them that *Rodrigue* should not be applied retroactively to this case. Too much reliance has been placed by the parties and the trial judge on the pre-*Rodrigue* law and the results cannot now be undone even by a remand for a new trial. To borrow this Court's language from the *Chicot* case (supra) "the past cannot always be erased by a new judicial declaration." For instance, in relying on pre-*Rodrigue* law the trial judge in this case, long before the trial on the merits, sustained a motion by one of the original defendants, Boehck Engineering

Company, and dismissed the suit against it. Boehck was the seller of the crane which fell and led to the death of Mr. Soileau which is the core of this litigation. The motion and ruling were based on the ground that the only cause of action asserted against Boehck was under provisions of the Louisiana Civil Code which makes sellers responsible for latent defects in the merchandise they sell. The Judge correctly held that plaintiffs could not avail themselves of Louisiana law since the cause of action arose in a locality subject to maritime law. There is simply no way to undo that ruling now. At the same time, is it valid to speculate that if Boehck had remained in the suit, it may have been dismissed after a trial on the merits anyway? If it decided to impose liability, may not a jury have conceivably found Boehck responsible or at least jointly responsible with Unit which would have lessened the burden of the judgment imposed on Unit?

Further relying on pre-*Rodrigue* law, the trial judge, on his own motion, during a pre-trial conference held approximately three weeks prior to trial on the merits, (and about two weeks before this Honorable Court granted writs in *Rodrigue*) struck Mrs. Fontenot's demand for a jury trial. He did so on the then correct conclusion that plaintiff's only cause of action against Unit Crane and Shovel Corporation was under the provisions of the Death on the High Seas Act. Since the ruling was patently correct on the basis of established law, Unit Crane and Shovel Corporation did not take issue with it and thus lost the right to have the case tried by a jury to which it is presumably entitled under the *Rodrigue* holding. The loss of a jury trial could, of course, be remedied by a remand for a new trial. This is the *only* way, however, it could be remedied. We totally disagree with applicants in their argument that even if this Court should hold that *Rodrigue* is to be applied retroactively to this case, a re-trial is unnecessary because the trial judge has already considered all con-

ceivably applicable laws while trying the case and made his findings with reference thereto. This facile argument assumes that the jury would, of necessity, be compelled to make the same findings. A glance at the complex factual issues inherent in the evidence adduced in the trial of this case makes such an assumption patently untenable.

Frankly, we have never heard of a case in which the trial judge reserved plaintiff's rights to proceed not only on the basis of existing laws (which the judge is sworn to administer) but on the basis of some future law, which the judge thinks ought to, but which may or may not, come to pass. (After all, this Court in *Rodrigue* could conceivably have affirmed the *Snipes* line of jurisprudence which had been followed in the Fifth Circuit for some ten years; as it recently upheld another creature of the Fifth Circuit—the doctrine of operational negligence). We submit that such practice should be viewed with disfavor and strongly discouraged.

Finally, while wearing the established-law hat (as against the speculative-law hat), the trial judge agreed that the general maritime law which applied to plaintiffs' causes of action (it applied to the death claim through DOHSA) did not contain any doctrines of strict liability with respect to product failures, such as are found in the laws of many states. To remedy this situation, the judge adopted as new substantive maritime law Sections 400 and 402(a) of the *Restatement of the Law of Torts* and predicated Unit's liability to plaintiffs on this newly-minted substantive maritime law. To our argument, that a re-trial is necessary if retroactivity is ordained, we add the proposal that the *Restatement* does not correctly reflect the Louisiana law respecting manufacturers' liability and that a jury instructed pursuant to applicable Louisiana law may well make different findings from those made by the trial judge on the basis of the *Restatement*.

In the alternative that this Court should hold that the *Rodrigue* decision is not to be applied retroactively, the following additional questions present themselves for review: Is there any substantive maritime law of strict products liability such as that set forth in Sections 400 and 402(a) of the *Restatement of the Law of Torts*? If there is no such law at present, may it—deus-ex-machina-fashion—be established by a federal district Judge sitting in admiralty? If it may be, should it be? In brief, the case poses for resolution the problem so skillfully outlined by Judge Layton in *Noel v. United Aircraft Corporation*, 204 F. Supp. 929 (1962):

> "* * * * Thus, in spite of the fact that they cannot advance some of the strongest reasons for expansion of implied warranty liability, Libellants are asking this Court to extend it into areas not yet reached by the highest Court of any state.
>
> "Finally, introduction of implied warranty of fitness into admiralty would not harmonize with existing admiralty policy. Confusion would be created as to the relationship of implied warranty of fitness to the existing admiralty doctrine of unseaworthiness. If unseaworthiness and implied warranty of fitness are the same, the Court has already explained why Supreme Court limitations on the scope of unseaworthiness bar extension of either doctrine in admiralty to embrace manufacturers and passengers. However, if implied warranty of fitness is deemed to be different from unseaworthiness, its introduction into admiralty should be accompanied by careful definition of its boundaries, to avoid confusion with unseaworthiness. The Court has tried and failed to find any meaningful distinctions between the two doctrines. There is no substantial difference between the implied warranty that a propeller is fit and the implied warranty that a propellor is seaworthy (or airworthy). The only important

> difference lies in the classes of persons owing the duty, and the class of persons protected. If the doctrine of unseaworthiness is to be expanded by calling it 'implied warranty of fitness,' that expansion should be made by Congress or the Supreme Court, not here.
>
> "The Court concludes that implied warranty of fitness should not be incorporated into the general maritime law at this time."

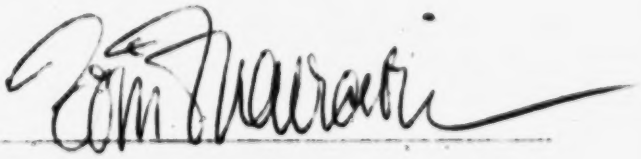
In this connection it may also be well to recall that the occurrence of a tort on navigable waters is but one of the bases for admiralty jurisdiction:

> "The basis for admiralty jurisdiction must be a combination of a maritime wrong and a maritime location. In addition to the requirement of locality, there is a continuing undercurrent which requires that the controversy have a maritime nexus. The tort must arise from a maritime transaction, or be of a maritime nature, or deal with a maritime subject."
> *McGuire v. City of New York*, (S.D. N.Y. 1961) 192 F. Supp. 866.
>
> See also: *Atlantic Transport Company v. Embrovek*, 1914, 234 U.S. 52, 34 S.Ct. 733, 58 L.Ed. 1208.

Succinctly stated, admiralty does not and should not concern itself with non-maritime affairs. That conclusion has been recognized and underscored by this Court in the *Rodrigue* decision itself, when it refused to expand admiralty jurisdiction over the offshore stationary drilling platforms, because they are essentially non-maritime. Should not the same restraint be applied by an admiralty court when it comes to the determination of a land-based manufacturer's liability for products which may, at best, have only casual connection with the water?

In the ultimate alternative that this Court should decree that this case remain under pre-*Rodrigue* law and should further endorse the amplification of existing substantive maritime law by Sections 400 and 402(a) of the *Restatement*, we believe that the decision holding Unit Crane liable to plaintiffs is based on erroneous conclusions of fact. These conclusions were not examined by the Court of Appeals in view of its decision to remand the case for a new trial. In an admiralty proceeding, Unit was entitled to have them examined as fully as if the case had been tried, de novo, before the appellate tribunal. *New Orleans Stevedoring Co. v. North Atlantic & Gulf SS Co.*, (CA-5, 1954) 213 F.2d 859.

In view of the above, we believe that a writ of certiorari should issue herein; that the decision of this Court in *Rodrigue v. Aetna Casualty & Surety Company*, 395 U.S. 352 should be declared to have prospective operation only; that the decision of the trial court should be reversed on the law (there being no maritime law of manufacturer's strict liability for product failures and Unit having been found free of negligence); alternatively, the decision of the trial could should be reversed on the facts which show that the crane in question was adequate and fell due to a gross overload, not any inherent defects; alternatively, the decision of the Fifth Circuit Court of Appeals should be affirmed.



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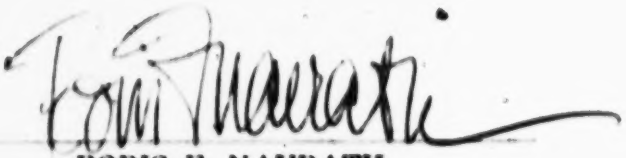
CERTIFICATE

In observance of the Rules, I have served three copies of the above and foregoing response on behalf of Unit Crane and Shovel Corporation upon all parties, by prepaid mail addressed to their counsel, this 5th day of February, 1971.



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